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PROCEEDINGS OF THE FOURTH CONFERENCE ON LEGAL AND SOCIAL PHILOSOPHY.

The fourth meeting of the conference in Legal and Social Philosophy was held under the chairmanship of Professor Roscoe Pound at Columbia University, on Friday and Saturday, November 26-27, 1915. The seven papers read dealt with different phases of the problem of law and force in private and public affairs. On Friday evening the members of the Conference were the guests of Columbia University at a dinner after which followed an informal discussion as to the outlook for legal-philosophical studies in this country. A vote of thanks was passed to Columbia University for its generous hospitality, and the chairman, Professor John Dewey, and the secretary were appointed a committee to arrange for the publications of the papers of the conference.

M. R. COHEN,
Secretary.

The papers read by Professors Cohen, Orth, and Dewey are printed in full in this issue. Summaries of the other papers follow.

THE EXERCISE OF FORCE IN THE INTEREST OF FREEDOM. Felix Adler. Columbia University.

Force is a moral adiaphoron. The stigma attaching to the use of force belongs rather to its abuse. The employment of force is good or bad according as the ends for which it is used are good or bad.

The precept of non-resistance in the Sermon on the Mount is to be understood as a piece of ethical irony.

The right, or to be more explicit, the duty, of society to coerce individual members of it rests on the same ground and holds within the same limits as the duty of the individual to coerce himself. Self-coercion depends on the difference in the quality of one's impulses, on the choice one is bound to make between competitive ends. Self-coercion is of two kinds: stimulative and repressive; stimulative to overcome inertia, repressive to subject wrong to right impulses.

He who denies the duty of self-coercion must, to be consistent, fall back on the position of the Cynics. For they, the Cynics, were indeed consistent. They asserted not only the right of the individual to be free from outside compulsion, but also the right of each individual moment of the individual's life to be lived without regard or subjection to future moments. Hence they rejected civilization and its tasks, inasmuch as the prosecution of any task involves the subordination of the present to the content of some future moment.

But if the coercion of a man by himself be admitted, it follows that the exercise of force upon a man by society must in principle be likewise admitted. For we are social by nature; we take an interest in the achievement by each one of his ends, and we regard such achievement as a social benefit.

As to the limits within which outside interference is to be permitted and welcomed, these can best be prescribed by fastening attention upon the end to be attained. And here the positive conception of freedom seems to be the most helpful,—freedom defined as the release in each one of his most essential self, that is, of his distinctive gift and capability, or of that in him which is unique or most nearly so. A system of society in which such valuable contributions were elicited from each would be the ideal society. Stimulative and repressive social coercion are justified in so far as they provoke energy and check disturbing impulses,—always of course without discouraging spontaneity, which is the very good to be secured.

The antithesis of reason and force common in discussions of this subject seems misleading and inadequate; since reason is a faculty of inference and not of preference, has to do with the adapting of means to ends, and does not of itself afford guidance in the choice of ends.

The concept of freedom as defined is more illuminating. Let us contrast freedom and force, not reason and force.

The idea of law that would follow from what has been said may be illustrated by comparing the action of law with that of automatism in the human body. The system of co-ordinations by which we learn to walk, or acquire any kind of skill, such as that of performing on a musical instrument, is at first painfully and consciously acquired. Consciousness superintends every step in the process. But after a time the sequences reel off automatically. Consciousness retires from the field, ascends

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to a higher plane, and devotes itself to more interesting and significant business. Law, taking it in its broadest sense, may be regarded as the automatic machinery of freedom. It is the system of stimulations and repressions which the experience of mankind at any given time has found conducive to the attainment of the superior ends of life. In the minds of the more advanced members of the community repressive laws like the prohibitions of murder, theft, etc., have already become automatic. Such a thing as questioning or transgressing these laws never once in a lifetime occurs to them. (Of the stimulative laws, such as the requirement to pay taxes in support of the progressive interests of society, the same is not yet true.) As regards the backward members of society, however, the repressive laws are educative. Just as in certain diseases the convalescent needs to acquire all over again the art of walking, which his neighbors exercise without thinking, so the backward members of society have to learn painfully those habits of repression which for others have sunk below the threshold of consciousness.

Social compulsion therefore may be defined as discipline in the interest of positive freedom. We may expect that in future this salutary kind of compulsion will go to even much greater lengths than it has yet gone. Society as organized in the state has undoubtedly the right to interfere in the choice of the sexes by prohibiting the marriage of persons afflicted with infectious disease. If the study of human character could ever be so far developed as to determine what kind of temperaments are radically incompatible with one another (a bare throw in the air of course), it would be within the province of the state to prohibit the conjugal union of such temperaments, and thus to prevent the disastrous effects on real freedom which such incompatibilities are apt to cause.

I am well aware of the perils of this point of view. There is a brutal factor in the action of society, as in that of individuals. A given community is apt to mistake its prejudices for principles, its torpor for conservatism, its superstitions for spirituality. Such apprehensions as those that weighed on the mind of John Stuart Mill as set forth in his *Essay on Liberty* are not to be lightly dismissed. And yet the main trend of his argument was plainly determined by an individualistic conception of liberty which many of us no longer share. It is safe to say that on the whole the benefits of coercion outweigh the detriments. We

have only to picture to ourselves a state of society in which these coercions should not exist to realize that this is so. The dangers are real, but are due to the abuse of force and not to the exercise of it under the controlling idea of positive freedom which is here proposed.

EXTRA LEGAL FORCE IN THE ADMINISTRATION OF THE CRIMINAL LAW. E. C. Keedy. University of Pennsylvania.

The administration of the criminal law in the United States is affected by various extra-legal forces. The greatest of these is public opinion, which not only determines legislation, but also influences the action of administrative officials and the outcome of particular trials. Recent statutes restraining to some extent the privileges of an accused person and extending those of the state in a criminal trial are the result of the growing power of collectivism. The same philosophic trend is responsible for statutes such as the Sherman anti-trust law, restricting the individual's activity in business matters.

The enforcement of law is largely dependent upon public opinion. This is principally due to the fact that those officials whose duty it is to enforce the law are in most instances chosen by popular vote and frequently use their offices so as to secure political advancement. Laws restricting what are popularly regarded as legitimate personal privileges are rarely enforced. Instances of these are statutes regulating the sale of alcoholic liquors, forbidding the sale or smoking of cigarettes, fixing a speed limit for motor vehicles, and forbidding spitting on the sidewalk or riding on the platform of street cars. Seldom is there a prosecution for violation of the statutes making criminal the commoner forms of sexual immorality, viz., fornication, prostitution and adultery. As it is common knowledge that these violations are very numerous, it seems safe to conclude that the public is opposed or indifferent to the enforcement of these statutes.

Statutory laws against contraconception are found in many of the states. As there is a strong popular sentiment in favor of birth control these statutes are rarely enforced, their chief effect being to increase the difficulty of securing information on this subject. One of the results of this condition is abortion, which is a severe offense in all the states. Prosecutions for abortion are practically never instituted unless the mother dies. In such a case popular indignation is aroused rather by the unsuccessful

character of the operation than by the fact of the operation itself. Statements by physicians indicate the very large number of abortions annually occurring in this country. Though there are, perhaps, a less number of abortions because of the prohibiting laws, yet the chief effect of these laws is to prevent reputable surgeons from performing the operation, and thereby to increase the number of deaths because of operations performed by unskilful operators under septic conditions. Our statute books contain many laws making criminal certain business practices, but these are only to a small extent operative because they do not meet with popular approval. Public opinion also influences the verdicts of juries, as was evidenced in the Thaw, Becker, and Frank cases.

In observing the effect of public opinion on the administration of the criminal law three characteristics may be noted. They are (1) sentimentalism, (2) intellectual dishonesty, (3) disrespect for law.

Other forces which produce results not in accordance with the provisions of our criminal law are mob violence, the police "third-degree," the unwritten law, group activity for particular ends, and newspapers. All these exist because they are supported by public opinion.

THE SOVEREIGNTY OF THE STATE.¹ Harold Laski. McGill University.

The English analytic school of jurisprudence has worked out a monistic theory of the state which makes the rights of individuals and communities within the state derivative and not primary. It is believed by its adherents that the State possesses for its decrees a moral sanction superior to that of every other group. These other groups are indeed made to depend for their existence on the state and it is therefore assumed that they ought to surrender their minor interests to those of the larger whole.

The State is thus made to correspond to the Absolute of metaphysics and the groups are no more than incidents to its existence. They have to be its parts because, as Lotze argued, independence would mean impenetrability. Therefore just as it is possible to condemn or to praise the Absolute only as a whole the character of which is implied in its parts, so is it only possible to condemn or praise the state as a whole. What is

¹ Printed in full in the *Journal of Philosophy, Psychology and Scientific Methods*, Feb. 17, 1916.

in its parts is that which is implied in the whole and they have to be judged by its conduct.

Such sovereignty seems politically mistaken and morally iniquitous. We do deem real the goodness or badness of the groups. We do distinguish between, let us say, the individual American and America. The parts have a real and separate existence and have to be judged as independent and self-sufficing moral units. Nor is this all. If the state in the last instance must be obeyed we lose hold of the distinction between right and wrong. For there is rarely in marginal cases a means of distinguishing between the General Will and the Will of all as interpreted by the Government until after the event has or has not given it moral validation. So men and groups will continually be called upon to surrender their consciences to the dictates of a state which in any sane moral theory will be immoral. Such an attitude seems in a high degree dangerous.

It also lacks all historical justification. It seems quite clear that men as a fact follow the command which seems to them on the whole most in accordance with their conscience. When marginal cases like those of the Ulster unionists, the militant suffragists, the South Wales miners are considered, it is obvious that the demands of groups other than the state and, as a fact, in antagonism to it, make a greater moral appeal and possess for them greater validity than the supposed sovereign state, so that when disagreement occurs the sovereignty can become impotence. If we replace this attitude by a pluralistic theory we shall admit that the state is not to be regarded as a series of concentric circles of which it is the outermost envelope; on the contrary it is to be looked upon simply as one of the many groups to which the individual belongs. It competes for his allegiance just like his church or race or trade-union, and when conflict arises the choice of the individual ought to be made on moral grounds. He has not to invest the action of the state with any *a priori* moral validity. He has to follow its dictates only as they are ethically higher than those of its possible opponent. It is claimed that from this type of conflict a progressive morality will be secured more socially useful than that which would result from the adoption of the monistic theory. When the state has to prove itself by the superiority of its moral programme and the fulfilment of that Programme's promise we have a guarantee of advance which is of the greatest validity—certainly greater than when we assume that the state can do no wrong. History is strewn with the tragic results of this last assumption.